No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

BOARD OF SUPERVISORS OF THE COUNTY OF SAN DIEGO,

Petitioner,

vs.

GERALD J. LONERGAN, AUDITOR AND CONTROLLER OF THE COUNTY OF SAN DIEGO AND JAMES E. JONES, TREASURER-TAX COLLECTOR OF THE COUNTY OF SAN DIEGO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR IMPERIAL METALS CO., INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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INTEREST OF AMICUS CURIAE

Imperial Metals Co., Inc., is a California corporation engaged in business as a steel products importer and distributor. For the 1978-79 tax year Amicus paid ad valorem property taxes in

excess of $600,000 on its business inventories located in California. (This figure includes taxes on inventories of affiliated companies, as well as of third parties which Amicus was contractually obligated to pay.) None of these inventories were located on real property owned by Amicus.

Had Amicus owned real property in the counties where such inventories were located (Los Angeles and Alameda Counties), Amicus would have paid a total tax of approximately $200,000.00. Such differential was based solely on the fact that Amicus did not own real property in those counties. Many of Amicus' competitors owned the real property on which their inventories were located. Such competitors paid ad valorem property tax for the 1978-79 tax year, on inventories substantially similar to those of Amicus, at a rate approximately one-third that applied to Amicus.

Amicus has a substantial interest in the outcome of the litigation between the San Diego Board of Supervisors and the Auditor-Controller and Treasurer-Tax Collector of San Diego.

Pursuant to Rule 36, Amicus Curiae has obtained from the parties herein consents to the filing of a brief as amicus curiae, which consents are attached hereto as Appendices A and B.

STATEMENT OF THE CASE

Central to the instant controversy is the distinction between the "secured" and "unsecured" portions of the property tax roll. Since the inception of the California property tax in 1850, both real and personal property have been subject to taxation.[1] The State Legislature, however, concerned over the mobility of personal property and the danger that such property might escape taxation during the interval between assessment and collection, in 1857 passed a measure requiring the tax collector to demand and collect shortly after assessment taxes with respect to personal property owned by persons and corporations not owning any real estate in the county.[2] There thus evolved the notion of a "secured" and an "unsecured" property tax roll. The secured roll consisted of real property and of personal property owned by taxpayers who also owned some real property in the county -- in other words, taxpayers who were subject to a lien on their real property for payment of taxes. The unsecured roll consisted of all other property, i.e., personal property owned by taxpayers who owned no real property in the county.[3] Over the years, the composition of the secured and unsecured rolls has gone through modest modifications (most

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[1]Cal. Stats. 1850 ch. 52 §2.

[2]Cal. Stats. 1857 ch. 261 §9.

[3]See Rode v. Seibe, 119 Cal. 518, 520, 51 P. 869 (1898).

notably by inclusion on the unsecured roll of leasehold and other possessory interests of private parties in tax-exempt real estate), but the basic distinction between the rolls remains unchanged.[4] Today, property tax bills with respect to unsecured roll property (which are normally sent out in June) must be paid by August 31.[5]

Since unsecured property tax bills were prepared and sent before adoption by the County Board of Supervisors of the final budget, and before setting of the current year's tax rate, the California Legislature in 1872 authorized use of the prior year's tax rate for purposes of sending provisional unsecured roll tax bills. Once the exact tax rate for the current year became known, however, the county treasurer was required to refund any excess over the true rate of tax which had been collected, and, if less than the true rate had been collected, the county assessor could levy an escaped assessment to collect the difference.[6]

Such routine refunds and escaped assessments generated administrative expense and inconvenience

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[4]See opinion of the California Supreme Court below, 167 Cal.Rptr. at 822-823.

[5]Cal. Rev. & Tax. Code §2922(a).

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[6]See Abrams v. San Francisco, 48 Cal.App.2d 1, 3-4, 119 P.2d 197 (Cal.Ct.App. 1941); Cal. Pol. Code §§3820, 3824 (1872).

all out of proportion to the small dollar amounts of adjustments involved.[7] To remedy this

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[7]See Abrams v. San Francisco, supra, 48 Cal. App. 2d at 7:

> "[W]henever any change was made in the tax rate, the county authorities would be put to the needless trouble of either refunding the excess taxes collected, or collecting the resulting deficiency with the countless computations which these processes would entail. Usually the sums involved were so small (as illustrated by the comparatively small demands in these 736 causes of action) as not to justify the effort or expense. . . ."

In Abrams the 1932-33 rate (for San Francisco County) was $3.96 per 100 of assessed valuation, while the 1933-34 rate was $3.48 per $100. Using today's assessment ratio of 25% of full cash value, such rates would have amounted to .0099 and .0087, respectively, of full cash value. See also Delaney v. Lowery, 25 Cal.2d 561, 567, 154 P.2d 674 (1944).

To give a further example of the minute size of the differential under Art. XIII §12, for the 1976-77 fiscal year in Los Angeles County, the difference between the secured and unsecured roll rates for a typical taxpayer amounted to less than 2 cents per $100 of market value. For the 1977-78 fiscal year the difference was less than 6 cents per $100 of market value.

administratively burdensome situation, California adopted in 1924 what is now Article XIII, §12 of the California Constitution, which permitted the counties to assess and collect tax on unsecured roll property using the rate for the prior year's unsecured roll, without further adjustment upon the setting of the current year's rate. Expressly relying on the administrative convenience rationale and on the lack of materiality of the annual rate differentials, a California appellate court upheld this provision in Abrams v. San Francisco, 48 Cal. App. 2d 1, 7, 119 P. 2d 197 (Cal. Ct. App. 1941).

On June 6, 1978, the California voters by initiative measure enacted Article XIIIA of the California Constitution (Proposition 13). It expressly limits ad valorem taxation of real property to a rate of 1% of full cash value plus a small additional rate (now approximating .25% of full cash value) to service pre-existing (i.e., pre-July 1978) taxpayer-approved indebtedness. California Constitution Article XIII, §2, limits the tax rate on personal property to the rate applied to real property. The California Voter's Pamphlet accordingly informed California voters that Proposition 13's reduced rate limitation would apply to all taxable property (whether real or personal).[8] It is uncontested that Proposition 13's reduced rate applies to both: (1) all

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[8]The Voters Pamphlet is an official explanation of, inter alia, initiative measures, which is required to be sent to all registered voters within 40 days of an election. Cal. Elect. Code §§3572, 3578.

property on the secured and unsecured rolls for tax years after 1978-79; and (2) all personal property on the secured roll for tax year 1978-79 (which began July 1, 1978). Indeed, Respondents without contest taxed the two categories of property just described at Proposition 13's reduced rate.

At issue herein is the tax rate for property on the unsecured roll for 1978-79. Respondent (relying on Article XIII, §12) taxed such property at the much higher tax rate used the preceding year, despite opinions by the California Attorney General, the State Board of Equalization, and State Controller that Article XIIIA's reduced rate applied to unsecured roll property for 1978-79.[9] The provision relied upon by Respondent was, however, merely for administrative convenience so that small adjustments would not have to be made from year to year. It was not intended to create (nor prior to the 1978-79 tax year, did it create) material tax rate differentials, let alone differentials amounting to 300%.

Amicus in the instant case owned on the tax lien date for the 1978-79 tax year substantial inventories of steel. These inventories were either on real property not owned by the taxpayer or were in the possession of third parties pending delivery. The total value of personal

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[9] Opns. Cal. Atty. Gen. CV 78-76 (June 26, 1978); Board of Supervisors v. Lonergan, 100 Cal. App. 3d 841, 849 (Cal. Ct. App. 1980), rev'd. 27 Cal. 3d 855, 167 Cal. Rptr. 820 (1980).

property on which Amicus paid taxes amounted to approximately $27,000,000. Taxpayer was assessed and paid taxes of approximately $625,000. Had Amicus owned real property in Los Angeles and Alameda Counties (and hence been afforded the benefits of Proposition 13) its taxes would have been approximately $220,000 on the same personal property.

QUESTIONS PRESENTED

Whether the California Supreme Court's decision interpreting Article XIIIA of the California Constitution so as to impose a tax burden on non-real property owners approximately three times as great as that imposed on real property owners with respect to identical personal property violates the Equal Protection Clause of the United States Constitution.

Whether the decision reached by the California Supreme Court in interpreting Article XIIIA of the California Constitution is so arbitrary and capricious as to constitute a denial of due process.

SUMMARY OF ARGUMENT

The decision of the California Supreme Court irrationally and unconstitutionally discriminates against taxpayers not owning real property in the county where they have personal property because it subjects them to tax rates and burdens two to three times as great as those for real property

owners, without any legitimate state interest served by the creation of such disparity. The lack of a legitimate state interest is underscored by the fact that neither the voters nor the Legislature have ever entertained any policy to have non-real property owners bear a greater tax burden than real property owners.

The treatment afforded non-real property owners by the decision of the Court below is so arbitrary, capricious, and irrational as to deny them of their property without due process of law.

ARGUMENT

I. THE ACTION OF THE CALIFORNIA SUPREME COURT IN DENYING THE BENEFITS OF PROPOSITION 13 TO TAXPAYERS WITH PROPERTY ON THE UNSECURED ROLL FOR THE 1978-79 TAX YEAR VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. DIFFERENCES IN TREATMENT OF TAXPAYERS MUST BE RATIONALLY CALCULATED TO ACHIEVE A LEGITIMATE STATE PURPOSE, AND MUST NOT BE ARBITRARY.

In cases not involving matters judicially designated as suspect classifications or

fundamental rights, this Court has articulated the test for determining violations of the Equal Protection Clause as follows: state classifications must be rationally related to a legitimate state interest. City of New Orleans v. Dukes, 427 U.S. 297, 309 (1976). The classification used must bear some reasonable relevance to the purpose for which it is created. Absent such relevance, discriminatory schemes will be struck down. Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459, 462 (1937).

Classifications made in state tax measures "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" [emphasis added], and must not be "illusory." F. S. Royster Guano Company v. Virginia, 253 U.S. 412, 415 (1920). See also Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-527 (1959).

Interpretation and enforcement of facially valid taxing measures must also meet the rational relation/legitimate state interest test. Thus it was held unconstitutional for a county assessor to value one taxpayer's bridge at full market value, while other valuations in the county were between 49.29% and 55.70% of market value. Sioux City Bridge Company v. Dakota County, 260 U.S. 441 (1922).

B. THE CALIFORNIA SUPREME COURT'S DECISION IS ARBITRARY, FURTHERS NO LEGITIMATE STATE INTEREST, AND UNCONSTITUTIONALLY DISCRIMINATES AGAINST NON-REAL PROPERTY OWNERS.

For the 1978-79 fiscal year, Amicus paid property tax on its business inventories three times as great as it would have paid on the same inventories had it owned real estate in the two counties in question. This is not a case where a different rate of taxation is imposed on one class of property -- say, personal property -- because of its differences with another class -- say, real property. Rather, the decision below establishes one rate of taxation for personal property when owned by real property owners, and a much higher rate of taxation for identical personal property when owned by non-real property owners. Personal property on the unsecured roll identical to that on the secured roll has been taxed at triple the Proposition 13 rate solely because of the identity of the owner. This discrimination is arbitrary, unfair, and furthers no policy -- legitimate or otherwise -- ever intended by the voters or the Legislature.

In F. S. Royster Guano Company v. Commonwealth of Virginia, 253 U.S. 412 (1920), the taxpayer, a Virginia corporation with business operations both inside and outside that state, attacked on equal protection grounds a pair of revenue measures which had the effect of taxing

both in-state and out-of-state income of a corporation operating in both places, while completely exempting from taxation Virginia corporations whose only operations were outside the state. In holding the Virginia scheme a violation of the Equal Protection Clause, this Court found that, while it was rational to exempt corporations with no business in Virginia, it was not rational to exclude from this exemption the out-of-state operations of a Virginia corporation with in-state business. In so holding, the Court made the following observations:

> "[A] discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory.
>
> * * *
>
> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design." [emphasis added] 253 U.S. at 415-416.

Thus an irrational or arbitrary tax result is no less unconstitutional because it is inadvertent.

An even more apposite decision is Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928).

Pennsylvania imposed an .8% gross receipts tax on all corporations engaged in the taxicab business. Taxicab operators organized as sole proprietorships or partnerships, however, were not subject to any such tax. Despite the differences between these forms of business organizations, widely recognized for other purposes of the law, this Court held that the distinction in this context was arbitrary and not reasonably related to the subject of the legislation. The Court made the following comments, which are applicable to the result reached by the California Supreme Court in the instant case:

> "In effect §23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. [citation omitted] No decision of this Court gives support to such a classification. In no view can it be held to have

more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment." [Emphasis added] 277 U.S. at 402.

Just as the gross receipts tax in Quaker City Cab depended for its application on the identity of the owner of the taxicab business, so the application of Article XIIIA by the California Supreme Court below imposes a 300% differential in tax based solely on identity of the owner of the taxed property, i.e., based on his status as an owner or non-owner of real property in the County.

Whatever constitutional vitality the secured versus unsecured roll distinction might enjoy in the context of setting the time for collection of property taxes, there is no rational justification for imposing a materially heavier property tax rate on the unsecured roll -- the composition of which is determined solely according to whether the owners of such property also own real estate. This is an application of the concept that classifications valid in one context may be repugnant to the Equal Protection Clause in another. See Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459, 463 (1937), where this Court said:

"It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these

differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employees and exclude stock companies from the same privilege."

Real property ownership is not a rational basis for creating material differences in tax rates on personal property. Furthermore, such a distinction tends to discriminate against new businesses, smaller businesses, and businesses based primarily out of state, all of which are less likely to own a fee interest in their business premises than older, wealthier, and more established businesses. In Kramer v. Union Free School District, 395 U.S. 621 (1969), this Court held unconstitutional a New York statute which limited the right to vote in school district elections to owners and lessees of taxable real property and parents of children enrolled in public schools. One of the Court's objections to the statute was that it arbitrarily discriminated against adults living in their parents' or children's homes, military personnel, inhabitants of government-owned property, and clergymen, among others. Similarly, in Cipriano v. City of Houma, 395 U.S. 701 (1969), this Court struck down a Louisiana law limiting voting in municipal utility bond elections to property owners.

The massive tax differential created by the decision of the court below does not rationally further any legitimate state end. Indeed, neither the California voters nor the state legislature ever entertained a policy goal to impose heavier taxes on unsecured property than on secured property.

It is beyond cavil that the only legislative on public policy purpose for the bifurcated tax rate structure in effect prior to adoption of Article XIIIA was to avoid the administrative inconvenience of assessing unsecured roll taxes at a provisional rate and later making numerous minor adjustments to reflect the true rate.[10] None of the parties herein have even contended (nor could they credibly) that the California Legislature or voters ever intended by Article XIII, §12 of the California Constitution to impose a materially heavier tax burden on unsecured property than on secured property. Board of Supervisors v. Lonergan, 100 Cal. App. 3d 841, 845-846 (Cal. Ct. App. 1980), rev'd. 27 Cal. 3d 855, 867 (1980). Indeed every expression of legislative intent available shows that the Legislature

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[10] See Delaney v. Lowery, 25 Cal. 2d 561, 567, 571, 572, 154 P. 2d 674 (1944):

> "The purpose of the adoption of section 9a [now Cal. Const. Art. XIII, §12(a)] in 1924 authorizing the use of the tax rate for the prior year for unsecured taxes on personal property which was extended to possessory interests in land by the 1936 amendment, was to avoid the necessity of refunds and supplemental assessments arising because such unsecured taxes were collected before the current rate was fixed and were computed tentatively on the rate for the prior year, and to avoid any claim of unconstitutional lack of uniformity in the rate.

and voters intended to keep tax burdens substantially equal between the secured and unsecured rolls.[11]

Even the California Supreme Court does not contend that the voters or Legislature affirmatively intended in enacting Proposition 13 and its enabling legislation, to saddle non-real property owners with taxes three times greater than those on real property owners. Rather, the Court below merely found an absence of "any convincing evidence of the voters' intent" on the issue and then fell back on "the presumption against implied repeals" [i.e., repeal of Article XIII, §12(a)] to hold that Proposition 13's reduced rate did not apply to the 1978-79 unsecured roll. The point made here is that the voters (and certainly the

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[11]Cal. Const. Art. XIII, §12(b), requires the Legislature to adjust the prior year's tax rate as it applies to unsecured property in any year in which the assessment ratio is changed, in order to maintain equality between property on the secured and unsecured rolls. Cal. Const. Art. XIII, §2 (enacted many years after the enactment of what is now Cal. Const. Art. XIII, §12(a)) requires that the "tax per dollar of full value shall not be higher on personal property than on real property in the same taxing jurisdiction." Finally, Cal. Rev. & Tax. Code §2237, effective June 24, 1978, prohibits local governments from levying a tax on any property at a rate in excess of Proposition 13's reduced rate. As to the intent of the voters, see footnote 8, supra.

Legislature) never sought to achieve any state interest -- let alone a legitimate one -- by taxing personal property of unsecured roll taxpayers three times as heavily as personal property of real property owners. In any event, it would defy common sense to argue (as no one indeed has) that the voters affirmative entertained such an intent, but only as to one fiscal year. Thus, even if one accepts the California Supreme Court's strained interpretation of Article XIIIA, all one is left with is an inadvertent grossly discriminatory tax -- one which, according to this Court's decision in Royster Guano -- is no less constitutionally objectionable than deliberate arbitrary discrimination.

In summary, the question before this Court is whether a state court may constitutionally interpret and apply a state tax measure so as to impose a rate three times as high on non-real property owners vis-a-vis real property owners, with respect to exactly the same kind of property.

II. THE DECISION BELOW IS ARBITRARY AND CAPRICIOUS AND IGNORES THE CLEAR LANGUAGE AND INTENT OF PROPOSITION 13 AND ITS ENABLING LEGISLATION, THEREBY DEPRIVING UNSECURED ROLL TAXPAYERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Economic regulation, including taxation, which is palpably arbitrary or capricious

(including arbitrary tax administration) is repugnant to the Due Process Clause of the Fourteenth Amendment. West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1936); Weissinger v. Boswell, 330 F.Supp. 615, 622 (D.C. M.D. Ala. 1971). The court in Weissinger found violative of due process the ad valorem tax system in Alabama whereby property was assessed at varying percentages of fair market value ranging from 9.7% to 26.8%, and where the court was unable to find "any legitimate state objective to be served by the vast disparity." 330 F.Supp. at 624. Similarly, in McCarthy v. Jones, 449 F.Supp. 480, 484 (1978), the court found unconstitutional under the Fourteenth Amendment an Alabama statute providing for assessment of taxes on property at different percentages of market value in different counties, the court finding "no legitimate state objective" behind the measure.

The holding of the California Supreme Court is similarly arbitrary in that it taxes identical personal property at rate differentials of 300% based solely on whether the owner of such property also owns real property in the county. This is at least as arbitrary and irrational a discrimination at that present in Weissinger v. Boswell and McCarthy v. Jones, supra.

Furthermore, as discussed above, the California Legislature never intended, under the pre-Proposition 13 bifurcated tax rate system, to have property on the unsecured roll bear a heavier tax burden than property on the secured roll. Indeed, after passage of Proposition 13 the Legislature acted promptly to insure maintenance

of equality between the rolls.[12]

This lack of legislative or voter purpose behind so drastic a discrimination further underscores the arbitrariness of the California Supreme Court's decision below.

CONCLUSION

For the reasons discussed above, certiorari should be granted and the decision of the California Supreme Court below should be reversed.

Respectfully submitted,

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[12] See footnote 11, supra.

APPENDIX A

October 31, 1980

Gerald T. Manpearl, Esq.
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RE: Board of Supervisors of San Diego v. Gerald J. Lonergan, et al.

Dear Mr. Manpearl:

This will confirm that we have no objection and consent to your filing an Amicus Brief and/or Amicus Petition for Certiorari on behalf of the Board of Supervisors of the County of San Diego.

AYLWARD & KINTZ

/s/ Peter G. Aylward

By: Peter G. Aylward
Attorneys for the Board of Supervisors of the County of San Diego

APPENDIX B

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November 20, 1980

Gerald T. Manpearl, Esq.
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Dear Mr. Manpearl:

Re: Board of Supervisors of County of San Diego v. Gerald J. Lonergan, et al
Supreme Court, L.A. No. 31244

This will confirm that we consent to your filing an Amicus Brief in support of a Petition for Certiorari to the United States Supreme Court to be filed on behalf of the Board of Supervisors of the County of San Diego by Peter Aylward.

Very truly yours,

DONALD L. CLARK,
County Counsel

By /s/ Jack Limber
JACK LIMBER, Deputy

JL:bf
cc: Peter Aylward, Esq.